

Chairman John Thune
Questions for the Record
Commerce Committee Hearing on the Nomination of
Sarah Feinberg to be FRA Administrator
September 17, 2015

1. Your résumé reflects substantial communications and press relations experience, including at the White House and at Facebook, but it doesn't appear to include specific expertise regarding railroad safety before your current assignment. What do you believe you bring to the job, and how will you address concerns about a possible lack of subject-matter expertise should you be confirmed?

Response: As I outlined in my hearing testimony, it is an honor to have been nominated by President Obama to serve as the Administrator for the Federal Railroad Administration (FRA) and to have earned the confidence of Secretary Foxx. It is a great responsibility that I take very seriously.

FRA career staff has deep technical expertise and is phenomenally committed to their work. As Acting Administrator, I bring a broad perspective and leadership skills to channel that expertise in new ways to mitigate safety risks. In the time I have been directing FRA, I have fostered an atmosphere where, as an agency, we can adapt to new conditions and new realities in the rail industry, while being open to criticism. The result of that has been to find new solutions to old challenges like improving grade crossing safety, the handling of NTSB recommendations, and the improving of our financing program – the Railroad Rehabilitation & Improvement Financing (RRIF) program.

My time as Acting Administrator and as Chief of Staff at the U.S. Department of Transportation has prepared me to serve in the position of Administrator of FRA. In my current capacity as Acting Administrator, I have led the agency's response to multiple, significant rail incidents this year, including the West Virginia crude derailment, the Valhalla/Metro North grade crossing incident, and the Amtrak #188 derailment. I have led the agency in becoming a more transparent and accountable organization. I have set clear safety and accountability priorities and goals for the agency, and I have led the FRA in creating a much closer working relationship with the U.S. Congress and the National Transportation Safety Board (NTSB). As USDOT Chief of Staff, I led operational and legislative initiatives across all modes of transportation and served as the direct manager of most USDOT leadership.

My commitment is to continue to push FRA each day to be vigilant in the pursuit of safety, by utilizing innovation and new ideas to build on the positive work that was already taking place prior to my arrival at FRA.

2. Now that you have been Acting Administrator at the Federal Railroad Administration (FRA) for the past nine months, what do you see as some of the major management challenges at the agency?

Response: As with any change in leadership, new eyes can bring about fresh thinking in many areas of a vital safety operation like FRA. I am reevaluating the organizational structure of our agency to ensure the FRA is the most efficient and effective government agency possible. That requires maintaining the

strength of our workforce, especially in our critical safety disciplines. An aging workforce and hiring competition with the industry we regulate are the major challenges we face in hiring and retaining a full staff at the administration.

In today's world, it is a challenge for any organization to keep pace with rapidly changing innovation and technological advancements. I am committed to providing the staff at FRA with modern, high-tech tools we require in our pursuit to raise the bar of safety throughout America's rail network.

In addition to these challenges, I have also included this list of challenges to the committee previously:

- Implementing Positive Train Control;
- Constantly improving safety; and
- Ensuring the Railroad Rehabilitation and Improvement Financing (RRIF) program can be utilized by appropriate entities.

3. Do you use an official government e-mail account for all official business?

Response: Yes.

4. Do you use an alternate, alias, or other official account (apart from your primary official account) for any official business?

Response: No.

a. If so, is the Department's Chief Freedom of Information Act (FOIA) Officer aware of this practice?

Response: Not applicable.

b. Have you ever used a non-official e-mail account for official business during your various positions in the Administration? If yes, please explain your purpose and justification for this practice.

Response: No, it has not been my general practice to use a non-official email account for any official business during my various positions in the Administration. To the best of my knowledge and recollection, when I have been contacted by someone to my personal address, I have directed communications back to my business email account.

c. Have you ever used a personal, non-official device to send and/or receive text messages for official business? If yes, please explain your purpose and justification for this practice.

Response: See answer above.

d. Have you ever used any internal instant messaging system for official business? If so, are these messages properly archived?

Response: No. I have not used an internal instant messaging system for official business.

- e. Have you ever used any external instant messaging system, such as Google Chat, for official business? If yes, please explain your purpose and justification for this practice.

Response: No.

5. Are you aware of any other Department or Administration officials who use or have used non-official e-mail accounts and/or personal, non-official devices for official business?

Response: I am not aware of Department or Administration officials who use or have used non-official email accounts for official business, but DOT employees are permitted to access their DOT email accounts from personal devices through remote access solutions, including Outlook Web Access and Virtual Desktop Infrastructure. Activity is monitored/captured by the DOT system and is in line with all cybersecurity guidelines.

6. Are you aware of any unlawful or accidental removal, alteration, or destruction of electronic federal records in the Department's custody or control, including e-mails? If so, has the Department reported these incidents to the National Archives and Records Administration (NARA)? Please provide details of any such incidents, including the dates, number and type of records, and custodians involved, as well as any reports, including dates, made to NARA.

Response: No. I am not aware of any unlawful or accidental removal, alteration, or destruction of electronic federal records, including emails, in the Department's custody or control.

7. Are you aware of any Department employee's use of a private or independent e-mail server to conduct official business?

Response: No.

- a. If yes, who approved its use?

Response: Not applicable.

- b. What was the rationale or justification for its use?

Response: Not applicable.

8. During your hearing, you noted that many railroads are currently making a good faith effort to implement Positive Train Control (PTC).

- a. In making this assessment, how did you determine what constitutes a good faith effort?

Response: I based that statement on statements and meetings conducted with various railroads in recent months, as well as PTC safety plans submitted in 2015, as well as recent data railroads submitted to FRA that showed their PTC implementation progress to

date at a high level. However, FRA's assessment of a railroad's PTC implementation progress and the evaluation of its corresponding level of effort are ongoing.

FRA is conducting detailed reviews of each railroad required to implement PTC. These reviews supplement the high-level monthly progress reports that identify potential areas of non-compliance for all major aspects of PTC implementation. The goal of the detailed reviews is to determine whether a railroad's reported progress (or lack of it) is the product of its own inaction, or due to elements largely outside of the railroad's control (e.g., an insufficient supply chain or, for a tenant railroad, lack of its host railroad's or railroads' progress). To avoid subjectivity, FRA focuses on factual information that can be used to clearly demonstrate continued efforts on the part of a railroad to comply with the regulation.

- b. Based on your recent data collection and other factors that you consider, how many railroads, if any, are not making a good faith effort to implement PTC?

Response: FRA cannot make that determination until it completes the detailed investigations of the railroads that are already underway. The high-level monthly progress reports help to identify which railroads have shown the least progress, but we will not determine the level of effort railroads have made from high-level reports alone. In all areas where railroads cannot demonstrate compliance (e.g., locomotives, infrastructure, training, etc.), FRA will examine the reason and purported justification from each railroad.

Currently there are some railroads that have made little to no quantifiable progress toward demonstrating a fully functioning system, or part of such a system. Whether this is due to issues outside of the railroad's control (e.g., supply chain issues), or a failure to adhere its proposed implementation schedule, is not known, and should not be presumed, at this time.

- 9. President Obama's Executive Order 13563 requires agencies to take into account the benefits and costs and to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs. It requires agencies to select, among alternatives, those regulatory approaches that maximize net benefits.

- a. When evaluating the net benefits of a proposed regulation, does FRA consider benefits other than safety benefits?

Response: To evaluate regulatory impact, FRA follows current Federal guidance on regulatory review in Executive Orders 12866 and 13563, and Management and Budget (OMB) Circular A-4. As part of the regulatory review, FRA analyzes all available data and information to determine the likely consequences of the regulatory proposal. Information is presented in a regulatory impact analysis (RIA) that is reviewed and approved by the OMB and available for public comment.

- b. During your time as Acting Administrator, has FRA selected any regulatory approaches, from among available alternatives, that do *not* maximize safety benefits but nevertheless maximize net benefits?

Response: Safety is FRA's top priority. Since I was appointed Acting Administrator on January 12, 2015, FRA has published one Final Rule, and worked with the Pipeline and Hazardous Materials Safety Administration (PHMSA) on one additional Final Rule. FRA's Final Rule on Securement of Unattended Equipment was published on August 6, 2015. In the Securement Final Rule, FRA did consider a regulatory alternative to the Final Rule, but FRA chose not to adopt it because FRA determined that the Final Rule requirements were as effective at enhancing safety as the alternative considered, but at much lower cost. Thus, FRA rejected the more restrictive alternative. FRA further believed that given the tradeoff between the certainty of relatively low costs and the benefits of low-probability yet high-consequence incidents, the Final Rule was a reasonable approach.

The RIA on the Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains Final Rule (High-Hazard Flammable Train Final Rule) presents alternative approaches to the requirements included in the Final Rule. Again, after extensive analysis, regulatory review, and public comment, PHMSA and FRA determined the chosen approach would yield greater safety benefits in the most cost-effective manner. Furthermore, PHMSA and FRA followed a systematic approach to safety and believe that each component of the High-Hazard Flammable Train Final Rule was, and is, instrumental to ensuring the greatest safe rail transportation of high-hazard flammable liquids.

- c. Within the recent high-hazard flammable train rule, did FRA and the Pipeline and Hazardous Materials Safety Administration (PHMSA) select the regulatory approach with the greatest safety benefits? If not, why not?

Response: FRA and PHMSA believed that the best way to increase the safety of hazardous materials transported by rail was to implement a rule that addressed both the tank car standards and the operational controls for trains transporting significant amounts of Class 3 flammable liquids. This included requiring electronically controlled pneumatic (ECP) brakes on certain unit trains of Class 3 flammable liquids, as well as enhanced tank car standards. The RIA presents extensive information validating the approach taken by FRA and PHMSA.

- d. If confirmed, would you propose or adopt a regulation only upon a reasoned determination that its net benefits justify its costs?

Response: Under my direction, FRA would adopt or propose a regulation only after a careful review and determination of need that follows Federal guidelines for regulatory review. Federal guidance is very clear about the conditions to determine the need to propose or adopt new regulations. Additionally, regulatory proposals must be accompanied by analyses that look into their potential economic impact, paperwork

burden, and small business impact, among others. Information contained in these documents will allow me to carry out reasonable and justified regulatory efforts. Note that some statutory mandates from Congress direct FRA to issue regulations that might not meet the same standards as agency initiated regulations.

10. During your time as Acting Administrator, FRA issued an Emergency Order establishing a maximum operating speed of 40 mph in high-threat urban areas at the same time it had a pending final rule – issued about two weeks later – covering the same issue.

- a. What event or situation caused the need for an Emergency Order about two weeks before the issuance of the final rule?

Response: Numerous railroad accidents in the first three months of 2015 involving trains transporting large quantities of flammable liquids [discussed in FRA Emergency Order No. 30 (EO)] led FRA to the conclusion that immediate action was necessary to mitigate the effects of any future potential accidents. As explained in the EO, until DOT issued its final rule governing “high-hazard flammable trains” (80 Fed. Reg. 26643 (May 8, 2015)), FRA believed that public safety dictated that immediate speed restrictions be placed on trains transporting large quantities of flammable liquids in highly populated areas to mitigate the effects of any future derailments that might occur and could cause a significant hazard of death, personal injury, or harm to the environment and property.

- b. To what extent could the Emergency Order have been issued earlier based on that event or situation?

Response: While previous incidents had occurred involving trains transporting large quantities of petroleum crude oil and ethanol in the United States (which were, in part, the impetus for DOT’s final rule addressing “high-hazard flammable trains”), the increased frequency and continued pattern of incidents in early 2015 led FRA to the conclusion that additional immediate action in the form of the EO was necessary to ensure public safety in highly populated areas where any such derailment could result in catastrophic consequences.

- c. Could FRA have issued a separate final rule on maximum operating speed rather than acting through an Emergency Order?

Response: Given the short time period between issuance of the EO and the subsequent final rule (two weeks), it was not possible via the required regulatory processes to issue a separate final rule. FRA believed that immediate emergency action, under the agency’s express statutory authority (49 U.S.C. 20104), was necessary to ensure public safety following several accidents in short succession. The EO had the practical effect of imposing speed restrictions within “High Threat Urban Areas” for trains transporting large quantities of flammable liquids approximately 10 weeks earlier than did the final rule.

11. During your hearing, you mentioned that FRA has greater than 70 outstanding National Transportation Safety Board (NTSB) recommendations.

- a. In addition to recommendations regarding Positive Train Control (PTC), which NTSB recommendations do you find the most urgent or important?

Response:

- Obstructive sleep apnea and medical fitness for duty – The Office of the Secretary of Transportation is exploring the development of a rulemaking on obstructive sleep apnea. FRA would participate in any prospective action considered.
 - Sleep apnea: recommendation R-12-16; report RAR-12-02
 - Medical fitness: recommendations R-13-18 through R-13-21; report RAR-13-02
- Fatigue (identification, management, and mitigation) – FRA is currently working on a rulemaking related to fatigue risk management programs.
 - Recommendations R-12-17, R-12-18, and R-12-19; report RAR-12-02
- Inward-facing cameras – FRA is drafting a proposed rule related to the installation and use of recording devices in locomotive cabs. This important technology can be used for accident investigations and to conduct train crew operational tests.
 - Recommendations R-10-01 and R-10-02; report RAR-10-01
- Window retention – FRA is examining window retention performance in the May 12, 2015, Amtrak derailment in Philadelphia, and the December 1, 2013, Metro-North Commuter Railroad Company derailment in the Bronx. FRA will determine why exterior windows unintentionally opened and whether measures can be taken to keep the windows more securely in place during ordinary operations, while not inhibiting their removal in an emergency and jeopardizing passenger safety.
 - Recommendation R-14-74; report RAB-14-12

- b. Which recommendations do you find FRA should not implement at this time, and why?

Response:

- Uniform signal aspects – FRA has regulations in place and PTC will eliminate discrepancy or misunderstanding of the operating limitations of the signal displayed and its intended information.
 - Recommendations R-09-01 and R-09-02; report RAR-09-01
- Require PTC to detect the rear of trains – Detailed cost-effectiveness studies of requiring PTC to detect the rear of trains will add to the negative benefit-cost ratio that railroads widely state as a chief deterrent to implementing PTC.
 - Recommendation R-12-20; report RAR-12-02
- Require that emergency exits on new and remanufactured locomotive cabs provide for rapid egress and entry – Not enough data to support this recommendation. Also,

FRA rulemakings directed at securing the cab against intruder entry would be compromised.

- Recommendation R-09-03; report RAR-09-01

- c. Given differences in the two agencies' missions and the additional factors that FRA must consider, how would you determine which recommendations of the NTSB do not become regulatory priorities of the FRA?

Response: FRA carefully evaluates every NTSB recommendation. FRA conducts research regarding the recommendation using its large repository of historical safety information. It then compares the recommendation against existing and developing regulations, examines the feasibility of implementing the recommendations (e.g. determines if a technology exists or could be quickly developed to support the recommendation), and weighs the potential economic and safety impact if implemented. FRA then uses this body of research to inform its decision on whether, or how, to implement a NTSB recommendation.

- d. Should FRA have oversight of safety at WMATA in a manner consistent with the recent NTSB recommendation? If not, why not?

Response: In response to Urgent Safety Recommendation R-15-31 and 32 issued by the National Transportation Safety Board (NTSB) on September 30, 2015, USDOT has stated that they take every recommendation of the NTSB seriously, including how quickly they or we can implement an urgent recommendation. In this case, DOT agrees on the urgent problem identified by NTSB, but believes there is a faster, more effective way to address it.

DOT agrees that the Tri-State Oversight Committee (TOC), which is currently responsible for safety oversight of Metrorail, is ineffective. DOT disagrees, however, that the best, most urgent and most effective solution is to transfer safety oversight of WMATA's rail transit system to the Federal Railroad Administration.

Clearly, more needs to be done to ensure that there is sufficient safety oversight of WMATA until a MAP-21-compliant State Safety Oversight Agency (SSOA) regime is in place. The TOC has submitted a plan to achieve compliance, but it is not achievable in the short term. The approach DOT has outlined will allow for a ramping up of oversight of WMATA to a level consistent with what would be in place once a fully MAP-21-compliant SSOA is established. Therefore, it is essential that the District of Columbia, Maryland, and Virginia proceed with all due haste to establish a fully compliant SSOA. DOT will engage with the State and Federal officials from the region to expedite the required steps to replace the TOC with a fully functioning, sufficiently resourced SSO organization. Until a fully capable SSO is in place, the FTA will lead all oversight, inspection, and enforcement activities over WMATA.

12. During your hearing, you mentioned FRA plans to issue two new Railroad Rehabilitation and Improvement Financing (RRIF) loans in the near future.

- a. How many RRIF loan applications are currently pending at FRA (i.e., applications submitted but not approved/announced or disapproved)?

Response: 6.

- b. What is the potential loan volume of those applications, if approved?

Response: The total for the 6 above is \$4.9 billion.

- c. What is the distribution of those loan applications among intercity passenger, commuter, Class II freight, and Class III freight railroads?

Response: 1 port, 3 Class IIIs, 2 intercity passenger.

13. Do you view a host railroad that is subject to the PTC requirements and that does not achieve full interoperability with all of its covered tenant railroads by the deadline as having implemented PTC in accordance with its implementation plan?

Response: Under both the statute and the implementing regulations, full implementation of PTC systems requires interoperability with tenant railroads. Whether host railroad, tenant railroad(s), or both are responsible for the failure to fully implement the interoperable PTC system will be determined on a case-by-case basis.

14. The FRA currently serves dual roles as the primary funding agency to Amtrak while also sitting on its Board of Directors. Section 209 in the PRIIA Act of 2008 increased the financial responsibility of States for train routes fewer than 750 miles and operated by Amtrak. Given FRA's role in funding Amtrak and sitting on its Board, what do you see as the role of FRA in Section 209 matters between Amtrak and the States?

Response: Section 209 of the Passenger Rail Investment and Improvement Act (PRIIA) of 2008 required the Amtrak Board of Directors – in consultation with DOT and States – to develop a standardized methodology for allocating operating and capital costs for the 29 State-Supported routes among States and Amtrak. However, unlike with the NEC Commission, Congress did not authorize the creation of a body or forum for the Section 209 stakeholders to help facilitate complex, multi-party negotiations and implement the PRIIA requirements.

This summer, the PRIIA 209 States, Amtrak, and FRA formed the “State-Amtrak Intercity Passenger Rail Committee.” This new committee is intended to improve coordination, governance, policy development, and decision-making regarding the implementation of PRIIA 209. In many ways, this committee mirrors the intent of the “State-Supported Route Committee” included in the Senate’s DRIVE Act (H.R. 22, Sec. 35203) and the House’s Passenger Rail Reform and Investment Act (H.R. 749, Sec. 203), both of which include the FRA as a member of their respective committees.

FRA has followed the direction of Congress in taking a consultation role in the implementation of PRIIA 209, and concurs that the agency should continue to provide assistance and oversight to ensure the continued success of the State-Amtrak partnership to support these critical services. Twenty-one public agencies currently provide financial support for the 29 State-Supported routes,

with each agency having its own independent service priorities and operating under unique political environments. Amtrak must negotiate separate contracts with each of these entities. FRA's technical assistance and oversight is necessary to ensure the "equal treatment in the provision of like services" requirement from PRIIA 209 is met. Further, the costs of operating State-Supported routes are not fully allocated to the States; a portion of these costs are funded from the annual Amtrak Operating Grant appropriated by Congress. Therefore, FRA also has a role in overseeing the funds it provides for State-Supported services and ensuring those funds are used efficiently and for their intended purpose.

Separate, apart, and independent of FRA's financial oversight, FRA must also fulfill its role as the safety regulator over passenger rail services, which is expanded upon in the next question.

State-Supported routes serve an important role in our national transportation network, carrying nearly 15 million passengers in Fiscal Year 2014. Both the States and Amtrak recognize the value of these routes, as no services have been eliminated or reduced since the first year of PRIIA 209 implementation in Fiscal Year 2014 despite the States assuming approximately \$100 million in new costs. The FRA, States, and Amtrak are strong partners working together to deliver safe, reliable, and efficient passenger rail service to the millions of Americans that ride Amtrak and State-Supported services each year.

15. As the FRA Administrator, how would you envision the role of states when it comes to rail safety for intercity passenger trains that are operated by Amtrak or another rail passenger carrier?

Response: The safety of the traveling public and railroad employees is our number one priority. We support market-based options and competition. Whatever entity ultimately sponsors or operates commuter, intercity, or other passenger service (be it a State, local agency, joint powers authority, or private entity), that entity is ultimately responsible to ensure the safety of that service. FRA is committed to continuing to work with States or other entities to discuss roles and responsibilities to ensure that service it sponsors is operated safely and in compliance with Federal regulations.

16. During a June 2 hearing before the House of Representatives, you stated that you were closely looking at the issue of crew size and freight railroad operations. As Congress considers the issue, it would be helpful to understand the results of your evaluation thus far.

- a. To what extent are one-person crews currently used in the United States for the rail transportation of hazardous materials?

Response: The Association of American Railroads' (AAR) President and Chief Executive Officer, Mr. Edward R. Hamburger, reported in a letter dated October 16, 2013, to then FRA Administrator Mr. Joseph C. Szabo that "Class I railroads currently use two-person crews for over-the-road mainline operations." The FRA has not been informed of any exception to that statement, and believes that Class I railroads do not currently have any one-person crew main track operations that haul hazardous materials.

Based on information then FRA Administrator Szabo received from the American Short Line and Regional Railroad Association's (ASLRRA) President, Mr. Richard F. Timmons, in a letter dated October 17, 2013, ASLRRA could not be specific about each of its members' policies on transporting hazardous materials with one-person crews.

In some cases, there are operations consisting of one-person operations with remotely controlled locomotives at a maximum speed of 15 miles per hour over short distances.

In May 2014, FRA surveyed its personnel based in regional field offices to estimate the operational picture for short lines (Class II and III). FRA identified 14 short lines that operate with one-person train crews out of an estimated 752 total short lines.

FRA also estimated that 206 short lines handle "key trains," which are defined by AAR as trains with one or more loaded toxic by inhalation (TIH) or poisonous by inhalation (PIH) tank cars or 20 or more loaded hazardous materials cars.

FRA believes that 2-person crews may have significant safety benefits under certain limited circumstances. The agency is currently assessing whether 2-person crews should be required in such circumstances.

- b. In the United States, how many freight rail accidents or incidents per year involve one-person train crews?

Response: For the Railroad Safety Advisory Committee Train Crew Size Working Group, an FRA presentation showed that from January 2002 through October 2013, there were approximately 186 accidents/incidents involving a one-person train crew operating conventional locomotives (as opposed to remotely controlled locomotives). Of those 186 accidents/incidents, 24 occurred on main track, 139 on yard track, 4 in sidings, and 19 on industry track. This data is based on information provided by the railroads reporting the accidents/incidents and is not based on first-hand FRA investigations.

(Note that reviewed these reports offer the disclaimer that some reports appear to have counted only one crewmember on the train, but the report suggests that additional crewmembers may have been present.)

- c. How does the frequency and severity of freight rail accidents involving one-person train crews compare to those involving two-person train crews?

Response: FRA does not require railroads to submit data that would provide information regarding the total operating mileage for one-person crew operations in the United States, thus FRA cannot compare the frequency of one-person train crews to those involving two-person train crews.

As far as severity of accidents is concerned, FRA considers all reportable accidents/incidents to be severe enough that they should be tracked, but FRA does not

have a method in use to compare severity between these two-person and one-person crews as categories of accidents/incidents.

We do not believe that the severity of past accidents is an accurate predictor of the potential damages in future incidents.

- d. More broadly, do you agree with NTSB Chairman Hart's view that, based on limited experience, two-person crews are not a safety improvement over single-person crews?

Response: I have closely reviewed NTSB Chairman Hart's answers during the June 2 hearing on oversight of the Amtrak accident in Philadelphia, before the House Committee on Transportation and Infrastructure. Mr. Hart was answering a question from Rep. Brownley regarding whether it is Mr. Hart's opinion that a two-person crew might be an interim solution before PTC is fully implemented. I understood the question to mean whether a two-person crew on Amtrak, or other passenger railroads, is the solution, and do not believe the question applied to freight operations.

I understood Mr. Hart's answer to be that NTSB has little experience with two-person train operations in the cab of a passenger train, as most passenger operations have one engineer in the cab and other crewmembers in the body of the train. And, Mr. Hart did not see a safety improvement by adding a second train crewmember to the cab of a passenger locomotive (assuming there was room in the cab for a second person).

I agree that there is limited experience with two-person crews located in the operating cab for passenger service. However, I do think that the safety benefits of a two-person passenger train crew (one in the locomotive and one in the passenger compartment) are compelling – especially for assisting the locomotive engineer in coordinating the operation of the train (e.g. location of speed restrictions, work zones, slow orders, or during enroute failures), assisting the locomotive engineer in certain operational or administrative duties that would otherwise distract the locomotive engineer from safely operating the train (copying track warrants, handling sick passengers or passenger disturbances), and assistance of passengers – especially elderly or disabled - during boarding, debarking, and during emergencies.

17. Why did FRA choose not to codify in regulation its May 7, 2014 Emergency Order when it solicited public comment on the issue and had the opportunity to finalize the Order's requirements during the high-hazard flammable train rulemaking process?

Response: FRA worked with PHMSA to develop both the high-hazard flammable train (HHFT) Notice of Proposed Rulemaking (NPRM) and HHFT final rule (Final Rule). See 79 FR 45015 (Aug. 1, 2014) and 80 FR 26643 (May 8, 2015). In the NPRM, PHMSA proposed to codify and clarify the requirements of the May 7, 2014 Emergency Order. Based on comments received in response to the NPRM, as well as the agencies' analysis of the issues involved, the Final Rule did not adopt the proposed requirements. As explained in the preamble to the Final Rule, the expansion of the existing route analysis and consultation requirements of 49 C.F.R. § 172.820 to include high-hazard flammable trains was determined to be the best approach to

ensure that emergency responders and others involved with emergency response planning and preparedness would have access to sufficient information regarding crude oil shipments moving through their jurisdictions. This notification requirement was based on NTSB Recommendation R-14-001. Expanding the existing route analysis and consultation requirements of § 172.820 (which already apply to the rail transportation of certain hazardous materials historically considered to be highly-hazardous) would preserve the intent of the Emergency Order (i.e., enhancing information sharing with emergency responders in areas through which HHFTs move) and, in combination with the other new safety requirements in the HHFT Final Rule, obviate the need to continue notification to the SERCs as required by the Order and as proposed in the HHFT NPRM. Accordingly, the Final Rule contemplated that once the route analysis and communication requirements of § 172.820 are in full force as applied to HHFTs (i.e., March 31, 2016), the Order would cease to be effective.

Subsequent to publication of the Final Rule, FRA, PHMSA and the Department as a whole, received feedback from stakeholders expressing intense concern about the Department's decision to forgo the proactive notification requirements of the Order and as proposed in the NPRM. Generally, these stakeholders expressed the view that given the unique risks posed by the frequent rail transportation of large volumes of flammable liquids, including Bakken crude oil, DOT should not eliminate the proactive information sharing provisions of the Order and rely solely on the consultation and communication requirements in existing 49 C.F.R. § 172.820. In response to these concerns and after further evaluating the issue within the Department, in a May 28, 2015 notice (Notice), the Department announced that it would extend the Order indefinitely, while it considered options for codifying the disclosure requirement on a permanent basis.¹ FRA is currently working with PHMSA to address this issue through a separate rulemaking process.

18. As part of its recent PTC data collection, does FRA plan to ask railroads their estimated date for full PTC implementation? If not, why not?

Response: FRA will continue to look for opportunities to gather informative data from railroads on their progress implementing PTC. The current data collection is focused on information that will be directly useful for assessing compliance, and the progress towards achieving compliance. An estimated date of network completion was not considered to be of direct value for this purpose, as it would not change a railroad's state of compliance (the main driver of enforcement). FRA requested estimated dates for the submission of PTC Safety Plans (PTCSP), however, as this denotes a significant milestone that can be more accurately projected by the railroads. The submission of a PTCSP also represents a significant deliverable that will require FRA review, thus the projected date will help FRA manage its resources and prepare for expected submissions moving forward. FRA will continue to reexamine its information and data collection needs, and will adjust data we are requesting as future opportunities present themselves.

19. During your hearing, you mentioned that FRA has taken action on more than half of the outstanding NTSB recommendations and that you have found new solutions.

¹ <http://www.phmsa.dot.gov/hazmat/phmsa-notice-regarding-emergency-response-notifications-for-shipments-of-petroleum-crude-oil-by-rail>.

- a. How many new rulemakings have you initiated during your time as Acting Administrator? How many of these new rulemakings are significant under Executive Order 12866?

Response: Most rulemaking proceedings that FRA currently has underway began under previous FRA Administrators. However, since arriving at FRA, I have directed the initiation of a rulemaking on Locomotive Recording Devices. FRA initiated the Locomotive Recording Devices rulemaking on June 23, 2015, concerning inward- and outward-facing cameras and storage of camera images on locomotive event recorders, and protections for the use of these recordings.

FRA will continue to initiate new rules to the extent necessary and appropriate in carrying out its safety responsibilities.

- b. How many of the actions to address NTSB recommendations were initiated during your time as Acting Administrator? How many of these were new rulemakings?

Response: FRA initiated most actions to address NTSB-issued recommendations that were made prior to my tenure. Under my tenure, FRA has continued work on several NTSB recommendations, and sent new or fresh responses to the NTSB on several outstanding recommendations. FRA has received five new NTSB recommendations this year. FRA's subject matter experts are analyzing them and developing action plans, accordingly.

Finally, FRA (or PHMSA) has rulemakings underway to address 18 open NTSB recommendations.

20. Given the focus on crude oil and ethanol in the high-hazard flammable train rulemaking, for its railroad accident or incident reporting form, why does FRA not collect information on the total number of ethanol cars in the affected train, the number of ethanol cars that derail, and the number of ethanol cars that puncture?

Response: In the context of rail equipment accidents/incidents involving the release of a hazardous material such as ethanol, the information a railroad must provide to FRA under the regulations on the agency's accident reporting forms is only part of the information FRA collects. As part of FRA's investigation of a rail accident involving a release of hazardous materials, under its authority, FRA obtains accident-investigation information on the number and contents of railcars carrying hazardous materials in the affected train, as well as the number and content of railcars carrying hazardous materials that derail and those that puncture.

FRA published a notice in the Federal Register on August 12, 2015 (Notice), announcing its intent to collect on an existing Office of Management and Budget (OMB)-approved accident reporting form certain information about accidents involving trains transporting crude oil. As FRA stated in the Notice, FRA took this action in response to a series of rail accidents involving trains transporting crude oil, and the agency utilized an existing OMB-approved form to implement the

enhanced information collection requirement. As also explained in the Notice, although FRA utilized the existing form since it was the most efficient and expeditious method of immediately improving FRA's information collection activity, the agency is evaluating additional, more comprehensive, methods to improve its overall information collection activities on the transportation of hazardous material by rail. This includes information on the rail transportation of ethanol. Implementation of any significant changes to FRA's accident reporting forms will, however, necessitate a notice-and-comment rulemaking, a time-consuming process.

21. FRA has used safety advisories to address certain safety issues, including ballast defects and wheel impact load detector standards. Unlike rules, however, safety advisories are issued without a benefit-cost analysis and without public comment.

- a. When FRA issues a safety advisory on, for example, wheel impact load detector standards, does FRA expect that safety advisory to have the force and effect of law?

Response: No. FRA safety advisories by their nature provide strong recommendations, but not legal requirements. FRA enforces Federal laws, regulations, and orders. However, an FRA safety advisory may also reference a separate, enforceable requirement, such as a regulation.

- b. Does FRA expect railroads to have a legal obligation to comply with safety advisories?

Response: FRA does not believe that railroads have a **legal** obligation to comply with safety advisories, however, safety advisories provide strong safety recommendations.

- c. How does FRA determine for which issues it should issue a rule and for which it should issue a safety advisory?

Response: FRA often uses safety advisories to quickly alert the railroad industry to specific safety risks that current laws, regulations, and orders do not currently address, but that warrant the FRA-recommended voluntary action. In this way, FRA acts to carry out the principal rail safety laws, which Congress intended "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. 20101.

FRA also uses safety advisories to remind the railroad industry of existing requirements and of recent accidents in which noncompliance either contributed to the accident or aggravated its severity to alert railroads to consider addressing similar safety concerns.

22. For passenger locomotives, will qualified maintenance personnel, or others responsible for performing tests and inspections, be in violation in law if they deem locomotives to be in compliance and safe to operate even though on-board locomotive apparatuses are not fully operational? Does the use of the term "apparatuses" include on-board Positive Train Control locomotive apparatuses installed but not fully operational?

Response: If a track segment has PTC systems equipped, the locomotives traveling over that track must be PTC-equipped and the PTC onboard apparatus should be treated like any other locomotive equipment that must be inspected.

However, if the track segment is not yet PTC-equipped and the PTC onboard apparatus is not yet capable of functioning, it would not be sensible to treat the apparatus as defective because the PTC onboard apparatus is not inherently defective. Therefore, in that scenario, FRA would not at this time consider an inspection that determined the locomotive to be in compliance and safe to operate in violation of the rail safety laws.

FRA is determining the application of the safety laws and regulations, including whether or not PTC onboard apparatuses are "appurtenances." However, FRA would not consider the onboard PTC apparatus as an "appurtenance" in violation of the rail safety laws if the track segment is not yet PTC-equipped and the PTC onboard apparatus is not yet capable of functioning.

23. While predominantly focusing on the unit train transportation of crude oil and ethanol, the high-hazard flammable train rule has effects for tank cars hauling other commodities.

- a. How many tank cars carrying other Class 3 flammable liquids (i.e., flammable liquids other than crude oil and ethanol) will need to be retrofitted or replaced?

Response: In the RIA for the High-Hazard Flammable Train Final Rule, PHMSA estimated 354 tank cars are used to transport flammable liquids other than crude oil or ethanol in high-hazard flammable train (HHFT) service.

- b. Which flammable liquids other than crude oil and ethanol are most likely to be in a tank car that is part of a high-hazard flammable train, and what are the packing groups of those flammable liquids?

Response: The DOT is unaware of any commodities other than crude oil and ethanol that are offered from a single location in quantities that would trigger the requirements for an HHFT.

There are locations in the U.S. with high concentrations of chemical and petrochemical manufacturers, however, such as the Gulf Coast. In these areas, a railroad services a shipper on a spur line. Local trains pick up the tank cars and take them to a classification yard where they are put into long haul trains for delivery to their destination or destinations. On these spur lines, a railroad could pick up a sufficient number of tank cars containing flammable liquids to constitute a HHFT. (It is worth noting that trains on these spur lines usually operate at low speed because of factors such as track grade, curvature, or number of stops.)

Given the reported volume of commodities shipped in previous years, commodities most likely to be in a HHFT include gasoline, diesel fuel, methanol, styrene monomer, and aviation fuel.

Shipping Name	Id Number	Hazard Class	Packing Group(s)
Gasoline	UN1203	Flammable Liquid	II
Diesel Fuel	UN1202	Flammable Liquid	III*
Methanol	UN1230	Flammable Liquid	II
Styrene Monomer	UN2055	Flammable Liquid	III*
Aviation Fuel	UN1863	Flammable Liquid	I; II; III*
* Note: Under § 173.150(f), a flammable liquid with a flashpoint of 38°C (100°F) or higher that does not meet the definition of any other hazard class, may be reclassified as a combustible liquid.			

- c. For each of the ten flammable liquids that have the greatest number of carloads transported by rail, about what percentage of the total annual miles traveled by carloads of each flammable liquid (cumulatively by UN number) occur in high-hazard flammable trains?

Response: This information is not readily available. However, based on the 2013 Surface Transportation Board's Confidential Waybill Sample, 84 percent of the crude oil tank car loads and 47 percent of the ethanol tank car loads moved in unit trains. In the High-Hazard Flammable Train Final Rule, the DOT asserted very few tank cars (354) containing other than crude oil and ethanol would operate in HHFTs. Unfortunately, the Waybill Sample data does not contain the detail need to distinguish between the relatively limited numbers of originations of other flammable liquids. Nevertheless, DOT's assertion is supported by Railinc data provided by the Association of American Railroads (AAR) in its comments on that rule, which indicate that in the first quarter of 2015 less than 0.3 percent of origin-destination pairs of tank cars containing flammable liquid were in blocks of between 20 and 34 cars.

- d. To what extent do shippers of Class 3 flammable liquids have control over the composition of the trains that haul their products? Can a shipper of a single carload of a Class 3 flammable liquid other than crude oil or ethanol request not to be hauled in a high-hazard flammable train?

Response: Shippers of tank cars containing flammable liquids must (on the shipping papers for the tank cars) report accurately to the railroads the number and identification of the tank cars containing flammable liquids the shippers are offering into transportation. After the tank cars are accepted by the railroad, the shipper has no control over the composition of the train that hauls their cars of flammable liquids.

A shipper of a single car of flammable liquid other than crude oil or ethanol may request the car not be moved in a high-hazard flammable train. However, it is ultimately up to the railroad to assemble a train and, based on the specification and number of tank cars containing flammable liquid, operate the train in accordance with the regulations.

Senator Kelly Ayotte
Questions for the Record
Commerce Committee Hearing on the Nomination of
Sarah Feinberg to be FRA Administrator
September 17, 2015

1. In your written testimony you explained that the Federal Railroad Administration (FRA) is prioritizing the implementation of Positive Train Control (PTC) and that the Administration is hiring new staff and has established a task force that is charged with reporting to you the progress and performance of each railroad as it relates to PTC implementation. I understand the safety benefits of PTC and I want to see PTC technology fully implemented and operational as soon as possible.

What has the task force reported most recently regarding the progress of railroads with complying with the December 31, 2015, deadline for PTC implementation?

Response: The FRA has been actively engaged with all railroads regarding their PTC implementation progress for many years. Most recently, the FRA PTC Task Force has initiated a number of steps to collect specific and detailed data regarding implementation progress of all operating railroads currently required to be equipped with interoperable PTC systems by December 31, 2015. This data is essential to accurately track the railroads' progress and is also intended to support FRA's enforcement activities.

Most recently, railroads were asked to submit reports on their implementation progress by September 15, 2015, and to do so monthly until implementation is complete. This high-level reporting will be further supported by more detailed investigations of the railroads by FRA's regional staff, to provide additional resolution and reasoning for a railroad's reported progress. As of September 15, 2015, only one railroad has reported 100 percent implementation in all critical areas (locomotives, infrastructure, and training), and five railroads have reported completion of component implementation in at least one area. Currently, there are more than 10 railroads reporting little to no quantifiable progress that could demonstrate a fully functioning system, or a part of such a system.

Has the task force identified an enforcement plan for those railroads who will not meet the December 31, 2015, implementation deadline?

Response: Yes. In 2010, following a public comment period, FRA published a final rule stipulating how the agency would go about enforcing the PTC requirement.

More recently, we have stated clearly that we intend to enforce the current deadline of December 31, 2015, as mandated by the Congress. Assuming the PTC deadline is not extended, for those railroads that choose to operate beyond the deadline and in violation of the law, we have stated that we intend to enforce that law with fines, as well as requiring railroads to take additional steps to raise the bar on safety in lieu of PTC. Just like with any enforcement action, FRA will determine which railroads are in non-compliance based on factual investigations.

**Full Committee Hearing
Written Questions for the Record from
Senator Dan Sullivan for Sarah Feinberg**

Question 1. The railroad said it envisions running two trains per week with each consisting of 60-70 portable LNG tanks riding atop 30-70 flatcars. Alaska RR met with top FRA officials last December and filed its application last February.

Interior Alaska, especially around the Fairbanks area, has some of the highest energy costs in the country. In fact, households in Fairbanks average \$8,100 per year per home for heating, hot water and electricity. This is approximately three times more than the average annual energy cost in Anchorage, and nearly four times the national average.

The State of Alaska is trying to address those needs. The Alaska Industrial Development & Export Authority (AIDEA) has a process underway to meet those needs via transporting liquefied natural gas (LNG) to Interior Alaska. The state's railroad, the Alaska Railroad, figures prominently in a majority of the proposals and the process is nearing a decision point. However, the Alaska RR needs FRA approval to transport LNG. I understand the application was filed last February. Could you give me a status report on this application?

Response: Based on the information the Alaska Railroad Corporation (AKRR) provided FRA, FRA conducted a thorough review and analysis of AKRR's request for approval and proposed operations for the rail transport of liquefied natural gas (LNG) in container-on-flatcar (COFC) service. On October 9, 2015, FRA granted AKRR conditional approval under 49 C.F.R. § 174.63(a) to transport LNG in T75 portable tanks, effective for 2 years.

Question 2. The average delivery of a major infrastructure project is 14 years from start to finish.

Of that, the average time for environmental review for major transportation project had increased to a staggering 8 years in 2011 – up from 3.5 years in 2000. In addition, the average Environmental Impact Statement spanned 22 pages in length when NEPA was first written, today's highway projects often saw environmental documents of more than 1,000 pages. Those numbers are unacceptable and translate into increased costs, long delays, congestion on our rails and the loss of economic opportunity.

What is the average time it takes to deliver a large rail project in the US? What is average for a project that only uses non-federal funds? What is the average for a project that uses federal funds? What is one solution that we need to be doing that we aren't already doing to cut the permitting time?

Response: The delivery of large rail projects includes many activities, such as planning, preliminary design and environmental review, final design, and construction. With the recent expansion of FRA's rail investment programs, meaningful data on the duration of Environmental Impact Statements (EIS) is limited by the small number of recent EISs completed to date. Since

2008, FRA has completed two publicly-sponsored and funded construction project EISs that took an average of 4.4 years to complete. In the same period, FRA also completed 42 Environmental Assessments for publicly-sponsored and funded projects which took on average one year to complete.

FRA is committed to responsibly streamlining the delivery of rail projects. The Administration's GROW AMERICA Act sets forth many proposals to reduce infrastructure project delivery timelines. For example, Section 1001 of the GROW AMERICA Act could help provide environmental review agencies with adequate staff capacity to expedite rail and other transportation projects. However, ultimately the most critical factor in delivering large rail transportation infrastructure investments is predictable, dedicated funding.

FRA and DOT have taken several important steps to accelerate delivery for the environmental review stage of projects:

- In January 2013, FRA added seven Categorical Exclusions (CEs) to its list of 20 CEs. CEs provide significant time and cost savings for project sponsors because they eliminate the need for Environmental Assessments or Environmental Impact Statements.
- FRA has applied a tiered approach to environmental reviews for passenger rail corridor programs. This approach allows FRA to clear the envelope of a corridor at a high level so specific project elements can advance incrementally as funding becomes available.
- On September 22, 2015, the Office of Management and Budget (OMB) and the President's Council on Environmental Quality (CEQ) issued guidance that establishes a set of requirements for agencies to report a common set of project schedule metrics for infrastructure projects beginning in October 2015 on an enhanced Federal Infrastructure Permitting Dashboard.

Should FRA always be the lead agency in the NEPA process for a rail project? As the lead agency on a project, do you believe other agencies processes should have a time restriction for action? If so, what is a reasonable time restriction? And what would you need as FRA Administrator to empower the FRA in the NEPA process and get back to building the nation's infrastructure instead of studying it?

Response: Yes, in general, FRA should be the lead agency under the National Environmental Policy Act (NEPA) for rail projects receiving or expecting to receive financial assistance from the FRA.

FRA aims to efficiently conduct environmental reviews. CEQ NEPA regulations already encourage lead and cooperating agencies to use available discretion to coordinate environmental reviews to most efficiently address projects that vary greatly in complexity and substance. And, as discussed above, recent OMB-CEQ metric guidance encourages agencies to work together to set achievable project schedules that align and reduce time associated with permitting and environmental review timelines, when appropriate and practicable, and that deliver the best outcomes. As such, agreement on a tailored project schedule, with the concurrence of all Federal

agencies with jurisdiction over an environmental permit or review, is the most effective approach for a lead agency in establishing timelines for other agencies.

Senator Steve Daines
Questions for the Record
Commerce Committee Hearing on the Nomination of
Sarah Feinberg to be FRA Administrator
September 17, 2015

1. Ms. Feinberg, as we discussed at the hearing, Montana has nearly 3,200 miles of railroad track that moves agricultural commodities, record amounts of crude oil, coal and other manufactured products. Railroads are an economic bloodline for Montana, as we export the majority of these goods. Needless to say, it is imperative to Montana that we continue to move these passengers and commodities in a safe and efficient manner.

We hear in this Committee increasingly from witnesses that performance and outcome based regulations are worth pursuing given the proactive safety practices of industry and the rapid evolution of technology. Based on my experiences in the private sector, I know industry sets a high standard for safety and is most often the source of safety technology innovation. As Administrator, how would you characterize performance based regulation in the realm of our Nation's railroads and is this worth pursuing? Would this help facilitate innovation?

Response: FRA is committed to facilitating industry's technological innovations while still exercising proper safety oversight. Performance-based standards generally allow for innovations that maintain or improve safety, and minimize costs of compliance. Developing performance-based standards also presents opportunities for collaboration with industry that encourage new ideas and establish new working relationships.

An example: FRA tasked its Railroad Safety Advisory Committee (RSAC) to produce a set of technical performance criteria and procedures to evaluate passenger rail equipment built to alternative designs, to ensure that trainsets based on international platforms can be engineered to operate safely in the United States. Based on RSAC's recommendations, FRA is preparing a notice of proposed rulemaking to codify these technical performance criteria, which will allow the industry greater flexibility to use various contemporary design techniques and incorporate emerging technologies.

There are instances where it may be more appropriate to adopt design-based or a combination of design- and performance-based standards when developing a rule, and FRA sometimes needs the flexibility to make that decision. Notably, small entities may not have the human or capital resources to invest in order to take advantage of cost-savings from more performance-based approaches. FRA takes this into consideration in developing regulations generally applicability to all classes of railroads.

2. I was also glad you mentioned your work with PHMSA in your testimony and agree that FRA and PHMSA need to regularly work together with industry and stakeholders. In fact, on September 18, 2015, this Committee held a field hearing in Billings, Montana to examine state and local perspectives of PHMSA as we work to reauthorize the agency.

On July 16th, 2015, train cars derailed near Culbertson, MT. My understanding is that of the 22 cars derailed, only five (5) leaked, resulting in approximately 35,000 gallons of crude oil being released. Fortunately, there were no injuries, no fires, and no waterways were contaminated. Reports indicate the train was not speeding. We were lucky, unlike some of the accidents you referenced in your testimony. My understanding is there here were three (3) types of cars on that train – the unjacketed 1232s and jacketed 1232s, and the newest DOT-117 car. What lessons did you take away from how these three cars performed? As Administrator, how will you work with PHMSA and industry experts to ensure we continue to move increasing amounts of energy commodities in a manner safe to both the public and the environment?

Response: 22 total tank cars derailed in the Culbertson, MT incident. All derailed cars were specification DOT-111 tank cars, constructed to industry's CPC-1232 standard. Three of the derailed cars were equipped with jackets; the remainder were non-jacketed. Six of the cars were breached in the incident; all of these were non-jacketed. Of the six cars that lost product, one was punctured. Leakage from the other cars occurred from either the bottom outlet valve or top valves and fittings. The tank cars were constructed with ½" steel plate and were equipped with top fittings protection. The quantified survivability of these cars is between that of the legacy DOT-111 cars and that of the DOT-117 tank cars. The outcome of the derailment supports FRA's belief that thicker tank and top fittings protection, along with the distributed power configuration (an associated train handling and braking improvement), limited the consequences of the derailment.

If confirmed as Administrator, I will continue FRA's coordination with PHMSA and engagement with industry stakeholders and experts. FRA worked closely with PHMSA on the development of the HHFT rule and its regulatory impact analysis. This collaboration continues as the agencies address administrative appeals to the rule and prepare an NPRM for Oil Spill Response plans. FRA will continue to work with PHMSA to develop and implement interagency regulatory and enforcement strategies to address emerging issues such as the packaging and transportation of energy commodities such as crude oil and its derivatives natural gas, natural gas liquids, condensates, and ethane.

In regard to working with industry stakeholders, I believe government's regulatory and enforcement initiatives are a portion of an overall effort that includes all segments of the industry. Only through collaboration and open discourse can we identify meaningful measures to prevent and mitigate incidents involving energy products. We need industry experts to help inform our decisions and we need their leaders to take quick effective steps to mitigate risk. I will urge leaders in FRA's Office of Railroad Safety to continue to develop coalitions with industry to implement programs in which both persistent and emerging safety issues are identified and addressed. Should regulatory efforts be required we will engage industry experts to inform FRA's response. Further, FRA's Office of Research and Development will collaborate with industry to ensure our funded projects are focused on important safety issues and/or complementing ongoing industry research.

